Port *of* Everett

June 4, 2014

Adrienne Dorrah
Department of Ecology
Toxics Cleanup Program
PO Box 47600
Olympia, WA 98504-7600

RE: Comments of Proposed Amendments to Chapter 173-322 WAC

Dear Ms. Dorrah:

The Port of Everett ("Port") appreciates the opportunity to comment on the Department of Ecology's ("Ecology") proposed amendments to the Remedial Action Grant and Loan rules. The Port has been an active partner with Ecology in the effort to clean up Puget Sound, with multiple sites proceeding through various stages of cleanup under MTCA agreed orders or consent decrees. Through our partnership, Ecology and the Port have made incredible strides in reaching our mutual cleanup goals. We recognize that reaching these goals is highly important for the community of Everett as they will provide the foundation for an environmentally and economically healthy waterfront. We greatly appreciate the past grant funds that the Port has received – in our opinion, the careful use of these funds has resulted directly in high quality cleanups on a reasonable timeframe.

Overall, the Port believes the proposed rule amendments are well crafted and will facilitate faster and more efficient cleanups. The Port has only two specific comments on the rule.

- WAC 173-322A-220 (6): The Port believes the amendment allowing proceeds from contribution settlements to be used as match is a positive and constructive change to the rules. However, the Port requests clarification from Ecology on three points:
    - The Port requests Ecology to confirm that, even if a contribution settlement occurs late in the course of a cleanup process (say, just after approval of the Cleanup Action Plan), Ecology will compare the settlement against the total grant-eligible remedial action costs for the site, including costs incurred prior to the settlement, for purposes of determining if any refund is due to Ecology under WAC 173-322A-220 (6)(c). This is the way Ecology has historically evaluated insurance settlements under the grant rules, and clarification from Ecology that contribution settlement will be treated the same way would be appreciated.
    - The Port additionally requests confirmation from Ecology that contribution settlements may be used as match for cleanups that are in progress and covered by a current grant agreement at the time the rule amendments become effective. By

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confirming the applicability of the contribution settlement match provisions to cleanups that straddle the effective date of the rule amendments, along with the clarification requested above, Ecology will provide grant recipients a clear understanding of how this aspect of the rule amendments applies to current and future cleanups.

- Finally, the Port requests confirmation from Ecology that for "straddling" cleanups, a contribution settlement that occurs before the effective date of the rule may be used as match.

- WAC 173-322A-220 (6)(a): The Port is concerned that the notice required under this provision is vague, confusing, and undermines the confidentiality of Port legal strategy and puts the Port at a strategic disadvantage compared with private PLPs. The provisions of subsection 220 (6)(a) require that a grant recipient provide notice to Ecology of "an action to recover the claim." Neither "action" nor "claim" are defined, but we assume a "claim" is a claim for contribution under RCW 70.105D.080. While the filing of a lawsuit would be an obvious and specific "action" to recover a claim, the vast majority of MTCA contribution matters never make it to court. Instead, they are resolved as the result of non-judicial settlement negotiations between the PLPs. The decision to enter into such settlement negotiations is a matter of legal strategy discussed by the Port Commission in executive session. As authorized by law, settlement matters are not discussed by the Commission in public session until a provisional settlement agreement has been reached in order to protect the Port's legal position. If the Port is required under subsection 220 (6)(a) to notify Ecology of the initiation of settlement negotiations with other PLPs, such notice would be a public document describing an otherwise confidential legal strategy decision made by the Port. In other words, the provisions of subsection 220 (6)(a) would (at least partially) conflict with the executive session provisions of the Open Public Meetings Act, RCW 42.30.110. Requiring notice of settlement negotiations to Ecology would also put the Port at a disadvantage to other PLPs, because the decision to enter into settlement negotiation with a particular PLP (or set of PLPs) on a multi-party site is often a matter of strategy aimed at providing leverage over certain parties to expedite the cleanup and/or gain a more equitable allocation of liability. For all the forgoing reasons, we urge Ecology to omit subsection 220 (6)(a) from the final rule.

Thank you for your consideration of our comments. We look forward to working with Ecology under the revised rules as part of our larger cooperative effort to advance the Everett cleanup sites and reach the goals of the Puget Sound Initiative.

Sincerely,

John M. Mohr
Executive Director

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